

APR 7 1978

MICHAEL RODAK, JR., CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 19____

No. **77-1439**

WILLIAM RILEY HUGHES,
Appellant

vs.

THE STATE OF OKLAHOMA
Appellee

APPEAL FROM THE COURT OF CRIMINAL
APPEALS OF THE STATE OF OKLAHOMA
JURISDICTIONAL STATEMENT

ROBERT M. HELTON
713 Lamar Street
Wichita Falls, Texas 76301

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 19____

No. _____

WILLIAM RILEY HUGHES, *Appellant*

vs.

THE STATE OF OKLAHOMA, *Appellee*

**APPEAL FROM THE COURT OF CRIMINAL
APPEALS OF THE STATE OF OKLAHOMA**

JURISDICTIONAL STATEMENT

Pursuant to Rules 13(2) and 15 of the Rules of the Supreme Court of the United States, appellant, William Riley Hughes, files this statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction to review the judgment and sentence entered by the Court of Criminal Appeals of The State of Oklahoma in this case and should exercise such jurisdiction herein.

OPINION BELOW

The opinion of The Court of Criminal Appeals of The State of Oklahoma appears in 572 P. 2d 573 and 48 Okl. Bar Journal 2723 and is included herein as Appendix A (p. A1).

GROUNDS OF JURISDICTION OF SUPREME COURT

This appeal arises from a state criminal case wherein the appellant was convicted of unlawfully transporting for sale outside of the State of Oklahoma minnows which were seined or procured within the waters of Oklahoma, pursuant to the provisions of Title 29 Okla. Stat. § 4-115B. For this misdemeanor grade offense appellant was fined \$200.00 and costs.

December 6, 1977, is the date and entry of the judgment sought to be reviewed; January 6, 1978, is the date and entry of the order denying a rehearing; and the notice of appeal was filed on January 12, 1978, in The Court of Criminal Appeals of the State of Oklahoma.

Title 28 U.S.C. § 1257(2) is believed to confer jurisdiction on this Court.

The case of *Charleston Federal Sav. & Loan Asso. v. Alderson* (1945) 324 US 182, 65 S Ct 624, 89 L Ed 857, reh den 324 US 888, 65 S Ct 863, 89 L Ed 1436 (see the last paragraph, 324 US at 185, 65 S Ct at 627, and authorities there collected and cited), is relied upon to sustain this Court's jurisdiction.

Since the validity of a state statute is involved, its text, verbatim, follows:

"No person may transport or ship minnows for sale outside the state which were seined or procured within the waters of this state except that:

1. Nothing contained herein shall prohibit any person from leaving the state possessing three (3) dozen or less minnows;

2. Nothing contained herein shall prohibit sale and shipment of minnows raised in a regularly licensed commercial minnow hatchery."

The official edition citation is: Title 29 Okl. Stat. § 4-115B. The official Session Law citation is: Laws of 1974, c. 17, § 4-115B.

A copy of the judgment is appended as Appendix A (p. A1). A copy of the order denying a rehearing is appended as Appendix B (p. A-6). A copy of the notice of appeal is appended as Appendix C (p. A-8). A copy of Title 29 Okl. Stat. § 4-115 and 4-116, verbatim, is appended as Appendix D (p. A-12).

QUESTION PRESENTED

As applied, is Title 29 Okla. Stat. § 4-115B repugnant to Art. I, § 8, cl. 3, U.S. Constitution?

STATEMENT OF THE CASE

The facts were all stipulated. The opinion below fairly and correctly states them. It will be quoted:

"The defendant for thirty years prior to the date of the offense in question was licensed under the law of the State of Texas as a minnow dealer; the defendant had a regular

commercial minnow business located in Archer County, Texas, approximately two miles south of Wichita Falls, Texas; he had been engaged in such business for one year before the date of the offense in question; on the day in question he purchased a load of minnow[s] from Fred Schokey, a minnow dealer licensed under the laws of the State of Oklahoma, at Mr. Schokey's place of business located at Purcell, Oklahoma; defendant was en route to his place of business at Wichita Falls, Texas, transporting the load of minnows in his vehicle, when he was detained and arrested in Waurika, Jefferson County, Oklahoma; the wholesale value and cost price of the minnows was \$350.00, and the defendant was detained and arrested by Hackell Bershere, an Oklahoma licensed Game Ranger, without a warrant. The amended information further reflects that the date of the purchase was on or about April 23, 1976."

Extracts from the opinion below which sustain this Court's jurisdiction under the rule of *Alderson*, supra, are:

"Defendant's sole assignment of error is that 29 O.S. Supp. 1974, § 4-115B violates the interstate commerce clause of the Constitution of the United States which confers upon the Congress of the United States exclusive power to regulate interstate commerce." Slip opinion, p. 2, Appendix A (p. A-2).

"... No person is allowed to export natural minnows for sale outside of Oklahoma. Such a prohibition is not repugnant to the commerce clause and the defendant's

assignment of error is without merit. The judgment and sentence appealed from is, accordingly, *AFFIRMED*." Slip opinion, p. 4, Appendix A (p. A-5).

This Court can and should judicially notice that the Court below is the highest appeal court in Oklahoma to which the case could be appealed in that state.

SUBSTANTIALITY OF FEDERAL QUESTION

This appeal presents, on the one hand, the right of Oklahoma to utilize its state police power and the right, on the other hand, of the citizens of other states to engage in interstate commerce with citizens of Oklahoma where the subject of the commerce is natural minnows taken from the waters of Oklahoma. The rights at stake are of that character and nature and importance which would warrant a final determination by this High Court. It is not enough that Oklahoma has the power to "reduce depletion of [her] natural minnows". The power is not invoked and the means are unwarranted when the state directly regulates interstate commerce for the purpose of retaining her minnows within her borders, when, at the same time she does not retain any state control beyond the use of the first party who is authorized to take natural minnows. Section 4-115B is a transportation law, prohibitory in nature. Its purpose is to stop the exportation of minnows out of Oklahoma. It does not limit the use of the minnows. Section 4-116A is the use regulating law. The use restriction of § 4-116A extends no further than to the party licensed to "take" the natural minnows from state waters. That party was Fred Schokey. Since the appellant purchased the minnows from Fred Schokey, appellant could very well be held to have purchased the minnows freed from all state control.

If so, commerce started; Oklahoma's police power ended; and only Congress is authorized to regulate the interstate character of the commerce involved in this case. If in the hands of the appellant the minnows are property freed of all state control and have become articles of trade, Oklahoma is "without power to prevent privately owned articles of trade from being shipped and sold in interstate commerce on the ground that they are required to satisfy local demands or because they are needed by the people of the state." (Citations omitted.) *Haydel's case*, 278 U.S. at 10, 49 S Ct at 4, 73 L Ed. 147 at _____.

As applied to the facts in this case and the statutes enacted by Oklahoma, these tendered constitutional issues have not heretofore been settled by this Court. This fact makes the issues substantial.

Six states border Oklahoma. It is well known that in the southwestern sun belt the minnow business is substantial.

The case is not mooted by any facts; not colored or feigned. It is an actual case and controversy. The low grade of the criminal offense does not reduce its interstate aspects. The question presented is of that nature and character and importance that would warrant plenary consideration, with briefs on the merits and oral argument, for their resolution.

CONCLUSION

For the reasons stated above, appellant submits that this appeal brings before the Court a substantial and important federal constitutional question which requires plenary consideration, with

briefs on the merits and oral argument, for their resolution.

Dated April 4, 1978.

Respectfully submitted,

ROBERT M. HELTON,
Attorney for Appellant

APPENDIX

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APPENDIX A

WILLIAM RILEY HUGHES, Appellant

vs.

THE STATE OF OKLAHOMA, Appellee

No. M-77-125

**COURT OF CRIMINAL APPEALS
OF OKLAHOMA**

**OPINION AND JUDGMENT
OF THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA**

BUSSEY, PRESIDING JUDGE:

The Appellant, William Riley Hughes, herein-after referred to as defendant, was charged in the District Court, Jefferson County, Case No. CRM-76-42, with Unlawfully Transporting for Sale Outside of the State of Oklahoma Minnows Which Were Seined or Procured Within the Waters of Oklahoma, pursuant to the provisions of 29 O.S. Supp. 1974, § 4-115B. The evidence was stipulated to by the parties and submitted to the trial court after a jury was waived. Upon conviction, the trial court set punishment at a fine of Two Hundred Dollars (\$200.00) and costs. From said judgment and sentence a timely appeal has been perfected to this Court.

The stipulated facts are as follows: The defendant for thirty years prior to the date of the offense in question was licensed under the law of the State of Texas as a minnow dealer; the defendant had a regular commercial minnow business located in Archer County, Texas, approximately two miles south of Wichita Falls, Texas; he had been engaged in such business for one year before the date of the offense in question; on the day in question he purchased a load of minnow from Fred Schokey, a minnow dealer licensed under the laws of the [p. 1] State of Oklahoma, at Mr. Schokey's place of business located at Purcell, Oklahoma; defendant was en route to his place of business at Wichita Falls, Texas, transporting the load of minnows in his vehicle, when he was detained and arrested in Waurika, Jefferson County, Oklahoma; the wholesale value and cost price of the minnows was \$350.00, and the defendant was detained and arrested by Hackell Bershere, an Oklahoma licensed Game Ranger, without a warrant. The amended information further reflects that the date of the purchase was on or about April 23, 1976.

Defendant's sole assignment of error is that 29 O.S. Supp. 1974, § 4-115B violates the interstate commerce clause of the Constitution of the United States which confers upon the Congress of the United States exclusive power to regulate interstate commerce.

Section 4-115B reads as follows:

"No person may transport or ship minnows for sale outside the state which were seined or procured within the waters of this state except that:

1. Nothing contained herein shall prohibit any person from leaving the state possessing three (3) dozen or less minnows;
2. Nothing contained herein shall prohibit sale and shipment of minnows raised in a regularly licensed commercial minnow hatchery."

The defendant argues that § 4-115B prohibits the export out of Oklahoma of minnows and that such state action is condemned by the United States Supreme Court in *Foster-Fountain Packing Co. v. Haydell*, 278 U.S. 1, 49 S. Ct. 1, 73 L. Ed. 147 (1928), as a violation of the interstate commerce clause.

However, *Foster*, supra, dealt with a Louisiana statute which prohibited raw shrimp, or raw shells, hulls and heads from being shipped out of Louisiana but allowed shrimp meat and bran, canned and manufactured within Louisiana, to be [p. 2] freely shipped and sold in interstate commerce. The Court held that Louisiana, as the representative of its people, could have retained the shrimp for consumption and use in Louisiana. It did not. The Court found that the sole purpose of the Act was to favor the canning of meat and manufacture of bran in Louisiana by withholding raw shrimp from plants located in nearby Mississippi. The Louisiana Act was, therefore, in violation of the commerce clause.

In the instant case § 4-115B prohibits anyone from transporting or shipping for sale, outside of Oklahoma, minnows which were seined or procured within the waters of Oklahoma. The issue raised is clearly distinguishable from that raised in *Foster*, supra, since the primary purpose of § 4-115B is to reduce depletion of natural minnows.

The United States Supreme Court has held on numerous occasions that the wild animals and fish within a state's border are, so far as capable of ownership, owned by the state in its sovereign capacity for the common benefit of all its people. Because of such ownership, and in the exercise of its police power, the state may regulate and control the taking, subsequent use and property rights that may be acquired therein. *Lacoste v. Department of Conservation*, 263 U.S. 545, 44 S. Ct. 186, 68 L. Ed. 437 (1928); *Geer v. State of Connecticut*, 161 U.S. 519, 16 S. Ct. 600, 40 L. Ed. 793 (1896); and *Foster*, supra. As stated in *Lacoste*, supra, protection of the wildlife of a state is peculiarly within the police power of the state, and the state has great latitude in determining what means are appropriate for its protection.

As aptly stated in the State's brief, Oklahoma law does not prohibit commercial minnow hatcheries within her borders [p. 3] from selling stock minnows to anyone, resident or nonresident, and minnows purchased therefrom may be freely exported. However, the law served to protect against the depletion of minnows in Oklahoma's natural streams through commercial exportation. No person is allowed to export natural minnows for sale outside of Oklahoma. Such a prohibition is not repugnant to the commerce clause and the defendant's assignment of error is without merit. The judgment and sentence appealed from is, accordingly, *AFFIRMED*.

AN APPEAL FROM THE DISTRICT COURT,
JEFFERSON COUNTY, OKLAHOMA.

HONORABLE P. C. LARGENT, JR., JUDGE

WILLIAM RILEY HUGHES was convicted for the offense of Unlawfully Transporting for Sale Outside of the State of Oklahoma Minnows Which Were Seined or Procured Within the Waters of Oklahoma; his punishment was assessed at a fine of Two Hundred Dollars (\$200.00) and costs, and he appeals. *AFFIRMED*.

R. M. HELTON,
WICHITA FALLS, TEXAS,
Attorney for Appellant

LARRY DERRYBERRY, ATTORNEY GENERAL
BILL J. BRUCE, ASST. ATTY. GENERAL
Attorneys for Appellee

OPINION BY BUSSEY, P. J.,
CORNISH, J., and BRETT, J. CONCUR.

FILED

In Court of Criminal Appeals
State of Oklahoma
December 6, 1977
Ross N. Lillard, Jr., Clerk

APPENDIX B

WILLIAM RILEY HUGHES, Appellant

vs.

THE STATE OF OKLAHOMA, Appellee

No. M-77-125

**COURT OF CRIMINAL APPEALS
OF OKLAHOMA**

**ORDER DENYING REHEARING AND
DIRECTING ISSUANCE OF MANDATE**

**ORDER OF THE COURT OF
CRIMINAL APPEALS OF THE
STATE OF OKLAHOMA ON REHEARING**

NOW, on this twenty-first day of December, 1977, the Court having considered the appellant's application for rehearing in the above styled and numbered cause, and being fully advised in the premises, finds that the same should be denied, and the Clerk of this Court is directed to issue the mandate FORTHWITH.

IT IS SO ORDERED.

WITNESS OUR HANDS, and the Seal of this
Court this sixth day of January, 1978.

HEZ J. BUSSEY, PRESIDING JUDGE

TOM BRETT, JUDGE

ATTEST:

ROSS N. LILLARD, JR.
CLERK

FILED

In Court of Criminal Appeals
State of Oklahoma
January 6, 1978
Ross N. Lillard, Jr., Clerk

APPENDIX C

WILLIAM RILEY HUGHES, Appellant

vs.

THE STATE OF OKLAHOMA, Appellee

No. M-77-125

**COURT OF CRIMINAL APPEALS
OF OKLAHOMA**

NOTICE OF APPEAL

1. William Liley Hughes, appellant, is the party taking the appeal.
2. He appeals from the Order Denying Rehearing and Directing Issuance of Mandate.
3. It was entered January 6, 1978.
4. He appeals to the Supreme Court of the United States by authority of 28 U.S.C. § 1257 (2).
5. This notice is directed to the Hon. Larry Derryberry, Attorney-General, and to the Hon. Bill J. Brice, Assistant Attorney-General, both of the State of Oklahoma, counsels of record in this Court, whose offices are in the State Capital Building at Oklahoma City, Oklahoma.

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Respectfully given,

R. M. HELTON,
Counsel for Appellant
713 Lamar St.
Wichita Falls, Texas 76301

CERTIFICATE OF SERVICE

I, R. M. Helton, a Member of the Bar of the Supreme Court of the United States, certify that a single Xerox copy of this Notice of Appeal together with a Xerox copy of Entry of Appearance in the Supreme Court of the United States of the undersigned as counsel for the appellant-petitioner therein, (the original of which is annexed to the original notice of appeal), was on the tenth day of January, 1978, mailed, first class, properly addressed and with sufficient postage, to the

Hon. Larry Derryberry, Attorney-General,
and Hon. Bill J. Brice, Assistant Attorney-
General, both of the State of Oklahoma,
Office of the Attorney-General, State
Capital Building, State of Oklahoma,
Oklahoma City, Oklahoma, 73105, a
distance of less than 500 miles.

I further certify that the aforesaid service constitutes service of the Notice of Appeal upon all parties required to be served in this case.

I further certify that on the tenth day of January, 1978, the original of this Notice of Appeal and the original of my Entry of Appearance in the Supreme Court of the United States was mailed, first class, properly addressed and with sufficient postage to the

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Hon. Ross N. Lillard, Jr., Court Clerk, The
Court of Criminal Appeals of the State of
Oklahoma, State Capital Building, State of
Oklahoma, Oklahoma City, Oklahoma,
73105.

Dated this the tenth day of January, 1978.

R. M. HELTON,
Counsel for Appellant
713 Lamar St.
Wichita Falls, Texas 76301
Member of the Bar of the
Supreme Court of the
United States

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 19__

No. _____

WILLIAM RILEY HUGHES, Petitioner

vs.

THE STATE OF OKLAHOMA, Respondent

ENTRY OF APPEARANCE

The Clerk will enter my appearance as Counsel
for the Petitioner.

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R. M. HELTON,
713 Lamar Street
Wichita Falls, Texas 76301

The Clerk is requested to notify counsel of
action of the Court by means of:

(X) Regular Mail

FILED
In Court of Criminal Appeals
State of Oklahoma
January 12, 1978
Ross N. Lillard, Jr., Clerk

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APPENDIX D

STATUTORY PROVISIONS INVOLVED

29 O.S. § 4-115

MINNOW DEALER'S INTERSTATE LICENSE

A. No person may ship or transport minnows for sale into this state from an outside source without having first procured a license for such from the Director.

B. No person may transport or ship minnows for sale outside the state which were seined or procured within the waters of this state except that:

1. Nothing contained herein shall prohibit any person from leaving the state possessing three (3) dozen or less minnows;

2. Nothing contained herein shall prohibit sale and shipment of minnows raised in a regularly licensed commercial minnow hatchery.

C. The fee for a license under this section shall be:

1. For residents, One Hundred Dollars (\$100.00);

2. For nonresidents, Three Hundred Dollars (\$300.00).

D. Any person convicted of violating any provisions of this section shall be punished by a fine of not less than One Hundred Dollars (\$100.00) nor more than Two Hundred Dollars (\$200.00).

Laws 1974, c. 17, § 4-115, eff. April 8, 1974.

29 O.S. § 4-116

MINNOW DEALER'S INTRASTATE LICENSE (Source within state, except as otherwise provided)

A. No person may seine, trap, transport and/or sell minnows within the state for commercial purposes without having first procured a license for such from the Director.

B. Each applicant shall be a bona fide resident of Oklahoma for a period of one (1) year immediately preceding his application, and it must appear to the Director that the applicant does not intend to use the license for the purpose of violating any of the laws of the State of Oklahoma, and the applicant's equipment complies with the provisions of Section 6-401 of this Code.

C. Persons excepted from the license requirements of this section are:

1. Those who seine, trap or transport minnows for their own use as bait, if the seine used does not exceed twenty (20) feet in length, and the mesh is no larger than one-fourth inch square, or if only one trap is used;

2. Any person under sixteen (16) years of age who seines, traps and sells minnows for commercial purposes within the county of his residence in quantities which do not require a special vehicle for

transportation, as described in paragraph 4, subsection A of Section 6-401 of this Code;

3. Any retailer selling lawfully acquired minnows.

D. The fees for a license under this section and the fee for renewal of such a license shall be Thirty-five Dollars (\$35.00).

E. Any person convicted of violating any provisions of this section shall be punished by a fine of not less than One Hundred Dollars (\$100.00) nor more than Two Hundred Dollars (\$200.00).

Laws 1974, c. 17, § 4-116, eff. April 8, 1974.